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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

5 Ways To Botch A Supreme Court Petition

By **Jimmy Hoover**

Law360, Washington (February 27, 2015, 3:50 PM ET) -- Inflating the number of questions presented and griping about lower courts are just two of the many surefire ways attorneys can join the 99 percent of U.S. Supreme Court petitioners whose pleas for review never see daylight, according to seasoned high court veterans.

While the high court's notoriously strict formatting and filing requirements often hobble cert contenders right out of the gate, those who do find an ear at the court frequently miss the mark by browbeating unimportant details while forgetting why the court exists in the first place: to settle the law.

Too often, experts say, attorneys see the small number of granted cases and resort to desperate tactics such as exaggerating circuit splits or a case's novelty in their petitions for writ of certiorari at the expense of the more important elements of the appeal, like the impact of a lower court's decision or the merits of an argument.

Here, five First Street pros reveal the common yet costly errors attorneys make when asking for an audience of the nation's top nine jurists.

Presenting Too Many Questions

Arguably the most important piece of the petition, the "Questions Presented" section, where appellants articulate the unearthed areas of legal territory the case raises, seems to draw the most mistakes, experts say.

Inexperienced petitioners will often list three, four and sometimes five allegedly novel legal questions that could be resolved with their case, a scenario that is doubtful at best in light of the volume of cases heard each year in the nation's federal courts, according to lawyers who frequent the court.

"When you open the brief and you see there are five questions, you know that's not a professional job," according to Timothy Bishop, a senior partner in the Supreme Court practice group of Mayer Brown LLP and co-author of a 1,000-page treatise on the court.

During his time as a law clerk for Justice William J. Brennan, Bishop said his boss looked first and foremost to the "QP" to determine whether to grant cert.

“Throwing in the kitchen sink is an immediate warning that this is not going to be a cert-worthy case,” Bishop said.

Overloading With Facts

For all of circuit courts' concern with abuses of discretion and procedural histories, the pages of cert petitions should remain relatively detail-free, experts say.

According to Daniel Volchok of WilmerHale's appellate group, a petition drifts farther and farther away from the bare-bones legal questions the justices are interested in solving with each grievance and factual circumstance it adds to the table.

“The justices are not your therapists,” Volchok, who clerked for Justice David Souter, said. “They do not care about every last misstep, and perceived slight … They care about specific questions of the law and whether your case is a good one to answer such a question.”

Volchok — who has helped pen "dozens" of briefs to the court including an ultimately successful petition in the Employee Retirement Income Security Act class action,Amgen Inc. v. Harris — said lawyers should aim to fall short of the document's 9,000-word limit, calling it a final cap, "not an invitation."

Including irrelevant details runs the risk of having your central points lost on the clerks, who sift through approximately 10,000 petitions every year, Volchok said. "Shortening the petition is always a good idea."

According to Rex Heinke, co-head of Akin Gump Strauss Hauer & Feld LLP's Supreme Court and appellate practice, "The focus of the cert petition has to be on why the Supreme Court should grant review, not why the decision below was wrong.”

That means tailoring the plea around fundamental legal questions left open by lower courts or contradicted by governing Supreme Court precedent, Heinke said.

Embellishing Circuit Splits

While tremendously helpful, lawyers say, the existence of a conflict among circuit courts is not the sole factor at play as the justices decide whether or not to hear a case, yet many attorneys will allege conflicts among appellate circuit courts where none exist, or stretch minor divergences into gaping chasms believing it’s their only chance to reach the rarefied bench, according to Volchok.

However, he warned, the first thing a law clerk will do after setting down a petition is look up the cases mentioned.

“If they find that you’ve overstated that conflict, you’ve dug yourself a big credibility hole,” Volchok said.

Volchok said it is a phenomenon he reads often in others' petitions that "is just going to end up hurting you."

That goes for exaggerating the circuit splits that do exist as well, which often takes the form of looping in irrelevant decisions to create the illusion of a patchwork of case law across the country.

“As soon as you start entering down the territory of making it seem too messy … then it starts becoming a fact issue,” Pratik A. Shah, co-head of Akin Gump's Supreme Court practice, said.

In reality, a circuit split is only one of the ways the court determines whether to grant a case. Other factors include state court splits, along with decisions over what Rule 10 of the Supreme Court Rules refers to as “important federal questions,” or those that affect a large industry or demographic.

On that last front, Bishop said he has successfully petitioned many cases for review, with one notable example in the 2000 case of Public Land Council v. Babbitt, where he argued that the U.S. Department of the Interior had impermissibly imposed restrictions on the rights to graze livestock on public lands. While there was no lower court conflict, Bishop said, the case was still “immensely important” to ranchers in the West.

“In short, petitioners should not get too hung up on the need for a circuit split,” he said.

Neglecting the Merits

One of the more controversial elements thought to doom a petition is limiting the document exclusively to jurisdictional questions, while omitting the basis of a petitioner’s legal argument for why he or she is correct.

According to Bishop, the oft-suggested notion that attorneys should wait until the briefing stage, after a case is granted review, before delving into the merits of an argument is “dead wrong.”

Evidence of this is the fact that the court reverses 65 to 75 percent of appealed decisions, Bishop said.

“The court more often takes the case when it’s troubled by the result [of a lower court.]” If not, he said, the justices will opt to sit on the issue until a similar case in the pipeline comes along.

Bishop pointed to the 2013 case of Georgia-Pacific West v. Northwest Environmental Defense Center, in which he had asked the court to determine in Georgia-Pacific’s favor whether the Clean Air Act mandated permits for runoff from forest roads, as the Ninth Circuit had suggested.

Overcoming cert opposition from the U.S. Department of Justice, Bishop said his legal team was “able to show that permitting precipitation runoff would be immensely costly and disruptive both for industry and for the state and federal regulators who would have to process millions of new permits, without any gain for the environment.”

However, to many, including Shah, with the flood of requests for rehearing that pour into the judges’ chambers each day, such a strategy is risky. Instead, focusing on jurisdictional questions like “clean” circuit splits affords cases far greater chances of being granted.

“To me that is the first and foremost goal of anything,” Shah said.

Fussing About State Laws

Despite the court's perch atop the more than one hundred courts of the federal judiciary system, one of the most common errors found in petitions has to do with state laws.

“Frequently, the petition will complain about an issue of state law, which the justices have no power to decide,” frequent high court counselor Tom Goldstein of the boutique Goldstein & Russell PC told Law360.

Goldstein, who is also the founder of SCOTUSblog, said it’s not just cases that are on appeal from state courts that are bogged down with irrelevant matters of state law.

“It’s actually a common problem in federal court petitions too, because there can be lots of diversity action suits involving state law in federal courts,” Goldstein said.

If those actions relied only on their diversity jurisdiction to make their way through the federal judiciary, by the time they get to the Supreme Court they are “dead in the water," he said.

However, if lawyers can position their arguments such that they involve a federal statute protecting state law, the justices will be more inclined to weigh in, Goldstein said.

“A variety of federal statutes depend on state rights,” he said.

--Editing by John Quinn and Kelly Duncan.
